IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12501

MEYER SCHNEIDER,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

JACOB W. FRIEDMAN,
Attorney for Appellant,
170 Broadway,
Borough of Manhattan,
New York City, N. Y.

LOUIS M. LEIBOWITZ,
of Counsel.

INDEX

TABLE OF CASES CITED

STATUTES

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12501

MEYER SCHNEIDER,
Appellant,
against
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Jurisdictional Statement

This is an appeal from a judgment of conviction of the United States District Court for the District of Montana, Great Falls Division, convicting the defendant, after a jury trial of the crime of bribery, in violation of 18 U. S. Code 201.

The jurisdiction of the District Court is conferred by 18 U. S. Code 3231. The jurisdiction of the Court of Appeals to review the judgment of conviction is invoked under 28 U. S. Code 1291.

Statement of the Case

Appellant was indicted in the United States District Court for the District of Montana in an indictment (R. 2-4) containing two counts, both under 18 U. S. Code 201. The first count is described as "offer of bribe" but alleges that

on November 22, 1948, appellant promised a certain lieutenant a bribe to influence his decision and action in a matter pending before him in his official capacity. The second count alleges the actual giving of a bribe of $1,500 to the same person for the same purpose on November 23, 1948. Appellant moved to dismiss the indictment, which motion was denied and exception taken on December 12, 1949 (R. 4-9). He also moved for a judgment of acquittal both at the close of the government's case and the entire case, which motions were likewise denied (R. 10-15). At the same time a motion was made to withdraw the first count from the consideration of the jury on the ground that it did not constitute a separate and distinct crime but was merged in the second count (R. 15-16). All motions were denied, the appellant offered no evidence and jury found him guilty as charged (R. 17-18). He was immediately sentenced to a term of one year and six months imprisonment and a fine of $4,500 (R. 19-22). Notice of appeal to this Court was duly filed the following day (R. 22-23). The district judge continued appellant on bail during the pendency of appeal (R. 381-384).

The Statute

The bribery statute under which appellant was convicted, 18 U. S. Code 201, reads as follows:

> "Section 201. Offer to officer or other person.—Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof,

with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

The Facts

The facts and the evidence tending to support them will e discussed in connection with the respective points.

Appellant's requests to charge, omitted from the record hrough inadvertence, are appended hereto.

Summary of Grounds of Appeal

1. Neither count of the indictment describes the duties r official function of the person to whom the alleged bribe vas promised or given; nor does the indictment specify he decision, action or matter involved; and the indictment s therefore insufficient as matter of law.

2. The government failed to prove that the alleged oferee of the bribe had any authority or official duty in onnection with the sale or disposition of government surplus property, and in other respects failed to prove the ommission of a crime within the scope of the statute.

3. The prosecution made improper references to other ffenses supposedly committed by appellant.

4. It was reversible error to receive in evidence the testimony of the witness Walker regarding three alleged telephone conversations with appellant in the absence of any proper foundation or identification of the person with whom hose conversations were had.

on November 22, 1948, appellant promised a certain lieutenant a bribe to influence his decision and action in a matter pending before him in his official capacity. The second count alleges the actual giving of a bribe of $1,500 to the same person for the same purpose on November 23, 1948. Appellant moved to dismiss the indictment, which motion was denied and exception taken on December 12, 1949 (R. 4-9). He also moved for a judgment of acquittal both at the close of the government's case and the entire case, which motions were likewise denied (R. 10-15). At the same time a motion was made to withdraw the first count from the consideration of the jury on the ground that it did not constitute a separate and distinct crime but was merged in the second count (R. 15-16). All motions were denied, the appellant offered no evidence and jury found him guilty as charged (R. 17-18). He was immediately sentenced to a term of one year and six months imprisonment and a fine of $4,500 (R. 19-22). Notice of appeal to this Court was duly filed the following day (R. 22-23). The district judge continued appellant on bail during the pendency of appeal (R. 381-384).

The Statute

The bribery statute under which appellant was convicted, 18 U. S. Code 201, reads as follows:

> "SECTION 201. OFFER TO OFFICER OR OTHER PERSON.—Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof,

with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

The Facts

The facts and the evidence tending to support them will be discussed in connection with the respective points.

Appellant's requests to charge, omitted from the record through inadvertence, are appended hereto.

Summary of Grounds of Appeal

1. Neither count of the indictment describes the duties or official function of the person to whom the alleged bribe was promised or given; nor does the indictment specify the decision, action or matter involved; and the indictment is therefore insufficient as matter of law.

2. The government failed to prove that the alleged offeree of the bribe had any authority or official duty in connection with the sale or disposition of government surplus property, and in other respects failed to prove the commission of a crime within the scope of the statute.

3. The prosecution made improper references to other offenses supposedly committed by appellant.

4. It was reversible error to receive in evidence the testimony of the witness Walker regarding three alleged telephone conversations with appellant in the absence of any proper foundation or identification of the person with whom those conversations were had.

5. The refusal of the trial court to permit appellant's counsel to inspect memoranda used by the witness Matthews to refresh his recollection was reversible error.

6. The Court erroneously charged the jury that the crime charged could be committed by negligence, and thereby in effect negatived the requirement of criminal intent.

7. The undisputed evidence discloses the existence of an elaborate plan to entice appellant to offer a bribe, so as (a) affirmatively to sustain the defense of entrapment and necessitate a judgment of acquittal; or (b) in any event to require the submission of that issue to the jury.

These matters will be dealt with seriatim.

ARGUMENT

POINT 1

Neither count of the indictment describes the duties or official function of the person to whom the alleged bribe was promised or given; nor does the indictment specify the decision, action or matter involved; and the indictment is therefore insufficient as matter of law.

The point about to be made was fully raised and protected prior to and during the trial. Appellant moved to dismiss the indictment at the outset (R. 8-9), contending (R. 4-5), "that the Indictment does not state facts sufficient to constitute an offense against the United States," and "in neither count of said Indictment does it describe the duties or official function of the said Apperson as an officer or as a person the defendant sought to bribe or did bribe." The motion was overruled and appellant's exception duly noted (R. 9, 29-30). The same ground was urged in the motion for judgment of acquittal after all the evidence was in (R. 11, 335, 348), which motion was denied and exception duly taken, and was later assigned as a basis of appeal (R. 386).

The first count of the indictment, described as "Offer of Bribe," reads as follows (R. 2-3).

> "That on or about the 22d day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and person acting for and on behalf of the United States in an official function, to-wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid."

It is to be noted that the caption "Offer of Bribe" is in itself at variance with the first count which it purports to describe but which actually charges a promise of a bribe. Since the statute differentiates between the two offenses of offering and promising and they are not synonymous terms, a conviction being permissible on either (see *United States* v. *Kemler* [D. C. Mass. 1942], 44 F. Supp. 649), a doubt is immediately introduced as to the Grand Jury's intent and meaning in this count. Appellant promptly objected to the discrepancy and the objection was overruled (R. 6). That the objection is not frivolous appears from the circumstances that the description is not an endorsement or something dehors the indictment but that it appears below the indicting words, "The Grand Jury Charges," and there is necessarily a doubt as to whether the Grand Jury intended to charge an offer or a promise—

something which any defendant is surely entitled to know at the outset. Indeed, the judge himself called it an offer (R. 205). This ambiguous form of indictment gives the government an entirely unwarranted latitude in presenting proof of an equivocal character so as to enable it to take advantage of either interpretation of which the evidence may be susceptible.

The second count, with the exception of charging the following date and the actual giving of the sum of $1,500, is couched in substantially the same language.

In order that an indictment sufficiently charge a crime under the statute involved, it is mandatory that the duties or official functions of the person bribed be alleged. That this is the law is established by a long line of authorities, several of which will be discussed.

In *United States* v. *Kemler* (D. C. Mass. 1942), 44 F. Supp. 649, the indictment charged a violation of Section 39 of the Criminal Code, then known as 18 U. S. Code 91 (the forerunner of the statute presently being considered). In sustaining a demurrer to and dismissing the indictment, Ford, D. J., wrote:

> "* * * It is incumbent upon the government to describe the duties or official function of the person who it alleges is acting for or on behalf of the United States. Sufficient allegations are necessary to show that the person to whom the money was offered is included in the class Congress intended to protect. For this reason, the indictment is defective as there are no facts from which it appears that the person acting in an official capacity was being bribed in connection with his line of duty * * * Consequently, the indictment does charge an offense against the statute in that it does not state all the facts of which the crime was constituted."

The foregoing case is especially significant in the light of similarity of language used in the indictment therein and that employed in the case at bar. Each count of the present indictment described Apperson as "a certain officer and person acting for and on behalf of the United States in an

official function" (R. 2-3). So, in the *Kemler* case, *supra,* the indictment charged the bribery of an individual described as "an officer and person acting for and on behalf of the United States in an official capacity." Extended argument was made on behalf of the government that the words "person acting, etc." constituted mere descriptive surplusage and added nothing to the indictment; this argument was made in support of the government's contention that allegations tending to show the actual duties and functions of the person were unnecessary, but the argument was explicitly rejected by the Court, which held as follows:

> "But a more difficult question to answer is whether the indictment is defective in that it charges Dr. Musgrove was an officer and person acting for and on behalf of the United States in an official capacity.
>
> "The government attempts to meet the argument by contending it has alleged only one charge in the indictment, to wit, bribery of an officer and that the words 'person acting for and on behalf are descriptive, surplusage and add nothing to the indictment.' To be sure an officer of the United States is usually in the performance of his duties, a person acting for or on behalf of the United States. But it is equally true that one may be guilty by bribing one not an officer as for instance an employee acting for or on behalf of the United States in an official capacity. These are two different classes of persons—cf. Shields v. United States, 58 App. D. C. 215, 26 F. 2d 993. I do not believe these words are descriptive and for that reason surplusage. They embrace the ingredients of a crime. Creel v. United States, 21 F. 2d 690, 691. Though the government could have charged bribery of an officer alone and described him as one who was acting for or on behalf of the United States in an official capacity, it did not do so. See Henderson v. United States, 4 Circ., 24 F. 2d 811."

The same statute was discussed in *United States* v. *Patterson* (D. C. Fla. 1923), 286 F. 760, where Call, D. J., granted a motion to quash, writing:

> "The indictment is silent as to what department or officer of the government under which the persons were

> acting or by whose authority they purported to act. 'General prohibition agents' is the way they are described in the indictment. By whom appointed or delegated is not charged. No allegation as to the duties pertaining to such 'general prohibition agents,' nor what official functions they were to perform on behalf of the United States. Allegations sufficient to show that the persons to whom the money was offered and given are included in the class Congress intended to protect from bribery are necessary to charge a violation of the section."

That the requirement of the law is not technical but substantial appears from the holding in *United States* v. *Gibson* (D. C. Ill. 1891), 47 F. 833, where Blodgett, J., sustained a motion to quash, holding:

> "It seems therefore to me too clear to require argument that, if it is not a crime under any law of the United States for an internal revenue officer to set fire to a distillery of his own volition or impulse, without the influence or request of another, then it is not a crime against the United States for another person to bribe him to do it. The statute I have quoted makes it a crime against the United States for any one to offer to bribe an officer of the United States with intent to influence him to commit, or aid in committing, or to collude in or to allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty; but to bribe or induce such an officer to do an act not connected with his line of duty impinges upon no United States law, and does not subject the offender to indictment and punishment in the United States Courts."

The same principle underlies the holding in *United States* v. *Christopherson* (D. C. Mo. 1919), 261 F. 224, where in a prosecution for presenting a false voucher to an army officer a demurrer was sustained, Faris, D. J., writing:

> "I therefore hold that an apt allegation that the officer, to whom the voucher in question was presented, was visited with authority to approve for payment,

or to pay such voucher, was necessary, and that lacking such allegation the indictment as to each of the five counts thereof is in this behalf defective."

One of the authorities most frequently cited in this connection is *Boykin* v. *United States* (C. C. A. 5, 1926), 11 F. 2d 484. That was a prosecution for bribing a prohibition agent. The indictment charged that the money was given "with the intent on the part of the defendants to unlawfully, feloniously, and corruptly influence the decision and action of the said M. T. Gonzaullas in his official capacity and function as aforesaid, on matters and proceedings then and there pending and then and there expected to soon be brought to law before him, the said M. T. Gonzaullas, in his official capacity, as aforesaid, and that the intent on the part of the defendants to influence him, the said M. T. Gonzaullas, to commit and aid in committing, colluding in, and allowing a fraud to be committed and perpetrated upon the United States, and with the intent to induce him, the said M. T. Gonzaullas, to omit to do acts in violation of his lawful functions and duties as aforesaid, all in order that violations of the National Prohibition Act should be committed and permitted in the Southern Division of the Southern District of Alabama, without detection, arrest, complaint, and prosecution". The conviction was reversed because of the insufficiency of the indictment, and Bryan, Circ. J., wrote:

> "The representatives of the government knew the acts which they would rely on to show a corrupt intent. But it is impossible, as it appears to us, to ascertain from the indictment what acts would be relied on at the trial. Nothing but conclusions are stated. No facts are alleged from which it could be determined whether the proceedings pending or to be brought before the prohibition agent related or would relate to violations of the National Prohibition Act, or what the fraud charged consisted of, or what acts it was the intention of the defendants to induce the prohibition agent to omit to do. The trial court was wholly without information as to the facts relied on, and could

> not possibly have determined whether the matters complained of were such as to affect the official duties of the prohibition agent."

The foregoing holding represents a sound statement of the law relating to the sufficiency of indictments of this character, and its applicability to the indictment now under scrutiny compels a reversal of the judgment.

Another case frequently noted in this connection is *In re Yee Gee* (D. C. Wash. 1897), 83 F. 145, where the defendant was discharged on habeas corpus. Hanford, D. J., declared:

> "An offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in performance of such functions if he should be so called, does not violate this statute."

A recent application of the rule is *Blunden* v. *United States* (C. C. A. 6, 1948), 169 F. 2d 991. There the defendants were convicted under 18 U. S. Code, Section 201 of having given a bribe of $31,000 and an automobile to a certain employee of the War Department to give them priority or an improper advantage over other purchasers of surplus property. In reversing the conviction and dismissing the information, the Court ruled that "the illegal act on the part of the government employee involved was outside the official functions of the employee to whom the bribe was offered". The Court also said that "although [he] had the opportunity through deception and fraudulent acts to ship out government property illegally, he still lacked the authority and jurisdiction to act in the matter, the essential element of the offense".

Soon thereafter the same Court handed down a like decision in *Zambroni* v. *United States* (C. C. A. 6, 1948), 170 F. 2d 272. While the memorandum opinion is predicated upon the previous decision in the *Blunden* case, *supra,* a reference to the transcript of record (at pages 8-12 thereof) shows that the defendant was charged with bribing two

officers; so far as material, the indictment alleged that defendant

> "* * * did give to said William T. Overton, Supervisor, Sugar Enforcement Division of the Office of Temporary Controls of the Office of Price Administration of the United States, and to J. W. Pattinson, Investigator, Office of Temporary Controls of the Office of Price Administration of the United States, both the said William T. Overton and the said J. W. Pattinson being persons enforcing and assisting in enforcing said General Order No. 8, issued pursuant to the Second War Powers Act, Title 50, United States Code, Appendix, Section 631 et seq., the sum of $920.00 for the transfer and delivery to the said defendant Angelo Alex Zambroni of sugar ration documents of the Office of Temporary Controls of the Office of Price Administration, said sugar ration documents representing in value approximately 23,000 pounds of sugar, with the intent on the part of said defendant Angelo Alex Zambroni to influence the official decision and action of the said William T. Overton and the said J. W. Pattinson, by the said defendant Angelo Alex Zambroni giving to the said William T. Overton and the said J. W. Pattinson Nine $100.00 bills of the Currency of the United States of America, the said William T. Overton and J. W. Pattinson in return therefor transferring and delivering to the said defendant Angelo Alex Zambroni sugar ration documents of the Office of Temporary Controls of the Office of Price Administration representing in value approximately 23,000 pounds of sugar, * * *."

It was also charged that the defendant Angelo Alex Zambroni was not a

> "* * * person entitled to acquire, possess, use, permit the use of, sell, or otherwise transfer sugar, a rationed commodity, in the amounts set out hereinabove in this Count Six, nor a person entitled to acquire, use, permit the use of, transfer, possess or control such ration documents of the value hereinabove set forth in this Count Six, in the manner aforesaid, * * *."

Defendant urged in appealing his conviction in that case that an indictment alleging the bribery, or offer to bribe, certain officials, which did not describe their official duties and functions or show the relation thereof to the subject of the bribe, did not state an offense against the laws of the United States. Although it is obvious that the Zambroni indictment was far more explicit than the one presently under consideration, Zambroni's conviction was upheld and the conviction was reversed.

The general rule as to the requirements of indictments was stated in *Pettibone* v. *United States,* 148 U. S. 197, 37 L. Ed. 419, "that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially, or by way of recital". See authorities cited in *Kellerman* v. *United States* (C. C. A. 3, 1924), 295 F. 796, 799.

The question has frequently arisen in state courts and under parallel statutes with the same result. Several helpful cases will be briefly noted.

In *Taylor* v. *State,* 42 Ga. App. 443, 156 S. E. 623, the Court quoted with approval the well established rule set forth in 4 R. C. L. 185:

> "It is * * * a universal principle that where the act is entirely outside of the official functions of the officer to whom the bribe is offered, the offense is not bribery."

The Court went on to declare that the rule that a person could only be bribed to do or not to do something in the line of his official duty was so generally recognized and so clearly of the very essence of a bribery statute that further citation of authority was deemed unnecessary.

Similarly, in *Selvidge* v. *State,* 126 Tex. Cr. 489, 72 S. W. 2d 1079, the Court held insufficient an indictment charging the appellant with having paid a certain sheriff a sum of money to permit the transportation of intoxicating liquor.

The Court declared that it was not within the sheriff's official duty to issue a permit to any one for the transportation of intoxicating liquor; that he could not legally issue such a permit, and therefore could not legally refrain from doing that which he was not by law authorized to do so as to constitute bribery.

In *Sugarman* v. *State,* 173 Md. 52, 195 A. 324, it was held that an attempt to bribe an officer engaged in making an unlawful arrest did not constitute bribery, the Court saying that the offense could occur only when the officer was engaged in the performance of his official duties.

Both the state and federal cases are reviewed in *State* v. *Butler,* 178 Mo. 272, 77 S. W. 560, where it was said:

> "There is no rule so uniformly adhered to by the courts, both state and federal, as the one 'that there can be no bribery of any official to do a particular act, unless the law requires or imposes upon him the duty of acting.' It is bottomed upon the sound and logical principle that he cannot be influenced to do something that he has no power or authority to do.
>
> * * * * * *
>
> "The very purpose of the statute is to prevent public officials from being influenced in respect to questions upon which they are authorized to act. How can an officer be influenced to act when there is no law requiring him to do so, and no power under the law authorizing him to act?"

Likewise, in *Schraeder* v. *People,* 73 Colo. 400, 215 P. 869, an information charging that the accused, a duly elected and qualified sheriff, had charged and received money for omitting and delaying to execute a warrant was insufficient in the absence of an averment that the warrant was delivered to or received by defendant and that its execution was one of the duties of his office.

In *Hill* v. *State,* 130 Tex. Cr. 362, 94 S. W. 2d 733, an indictment charging an officer with accepting a bribe to

permit a prisoner in his custody to escape was insufficient in law in the absence of an allegation that he had legal custody of the prisoner.

Viewed in the light of the controlling authorities, it is quite evident that the indictment now being examined does not measure up to the minimum requirements of law and fails to charge the commission of any crime under the statute. Consequently, no conviction can lawfully be predicated thereon.

Wholly apart from the foregoing objections to the indictment, appellant unsuccessfully moved prior to the commencement of the trial for the dismissal of the indictment (R. 4-8) on the grounds that it was too vague, indefinite and uncertain as to the facts charged; that it failed to inform the defendant of the nature of the acts alleged to have been done by him constituting the offense in either count; that it did not inform defendant in what respect the decision and action of the person or officer was intended to be influenced; and that it failed to allege either the matter that was then pending before the officer or the nature of the unlawful act defendant had attempted to induce the officer and person to do. In these respects the indictment does not measure up to the minimum requirements of law. Moreover, the deficiencies are of a character not cured or aided by verdict.

The point is one that has frequently been litigated, and the authorities uniformly exact from the government a strict conformity to the requirement of precise and sufficient allegations. So, in *Harris* v. *United States* (C. C. A.), 104 F. 2d 41, it was held that allegations of essential elements of a statutory offense were matters of substance and not of form, and their omission was not aided or cured by verdict. Likewise, in *United States* v. *McGuire* (C. C. A. 2), 64 F. 2d 486, cert. den. 290 U. S. 645, 78 L. Ed. 560, defects in a lottery ticket indictment were held to be substantial and not curable. Most specifically, the failure of an indictment against an assistant postmaster to identify forged paper or record as to which

a false entry was allegedly made was not cured by a guilty verdict and could not be supplied by intendment or implication. *Harris* v. *United States* (C. C. A.), 104 F. 2d 41. To like effect, see *White* v. *United States* (C. C. A.), 67 F. 2d 71, and *Brenner* v. *United States* (C. C. A.), 287 F. 636.

The application of these rules to the indictment under consideration discloses that the accused could not possibly glean therefrom the matter then pending before Apperson, character of the decision or action intended to be influenced, or what unlawful act he was supposed to be attempting to induce. On this ground alone, irrespective of everything else, the indictment must therefore fall.

POINT 2

The Government failed to prove that the alleged offeree of the bribe had any authority or official duty in connection with the sale or disposition of Government surplus property, and in other respects failed to prove the commission of a crime within the scope of the statute.

An examination of the statute with whose violation appellant is charged discloses that the gravamen of the offense is an intent to influence the decision or action of the offeree of the bribe in a matter pending before him in his official capacity, or causing that person to collude in the commission of a fraud, or the inducement of that person to do any act in violation of his lawful duty. Unless the case presents an influencing in an official capacity, attempted collusion in the perpetration of fraud or an inducement to do something (or omit to do something) in violation of an official duty, the crime is not established. It is therefore evident that the various authorities calling for precision in the allegations of the indictment to show facts constituting one of the aspects of the crime, do not represent any technical concession to pleading technicality

but are a substantial recognition that no one may properly be accused of crime where the components of the alleged offense do not come within the purview of the statute.

An examination of the evidence herein fails to reveal that Lieutenant Apperson could fairly be described as coming within any one of the classifications of individuals specified in the law. If we attribute to the evidence adduced by the government the construction least favorable to appellant, we find that it tends to show the making of an agreement between Apperson and appellant (largely, as we argue aliunde, at the rather marked instance of Apperson) to permit appellant to include in the merchandise legitimately purchased by him certain other merchandise which was the property of the government and for which no payment was to be made. If this was the fact, the acts of appellant constituted a larceny with the cooperation of Apperson. Nothing herein contained is designed, of course, to reflect upon the honesty of Apperson or to impugn the motives with which he acted—although we contend him to have been sufficiently misguided as to constitute his acts a species of entrapment. The important fact in the entire situation is that Apperson, as the record abundantly establishes, had no duty or official capacity whose performance or omission made it the possible statutory subject matter of a bribe. To take an extreme case, had the appellant walked into the office of the Air Corps and offered a telephone operator a sum of money if she permitted him to steal certain merchandise, and she agreed (whether dishonestly or with a view towards apprehending the appellant), it could not be seriously urged that appellant would thereby be violating 18 U. S. Code 201. The patent reason why he could not be prosecuted in that fashion would be that the telephone operator had nothing to do with the merchandise or its handling; ergo no payment to her to collude in pilferage could constitute the statutory offense. The fact that her knowledge of contemplated illegality put her in a position where she could report and prevent it would not alter the situation within the meaning of the law. As to Apperson, while his situation was ad-

mittedly not so clear, a study of all of the pertinent evidence on that subject shows that his official functions and duties did not embrace the delivery of the merchandise allegedly attempted to be stolen. The proper determination of this point necessitates a thorough study of the entire record, and it would extend this brief to a prohibited length if all the evidence bearing on the subject were to be detailed *in extenso*. However, we shall point out several highlights of the proof serving to show that the acts involved were not comprehended within his duties or functions and tending affirmatively to establish quite the contrary.

To begin with, the government offered in evidence as its first exhibit a copy of a certain technical manual which was supposed to be similar to the one governing his official conduct as an air base salvage officer (R. 67-69). This was a book of some 700 pages, and the prosecutor read lengthy extracts therefrom into the record (R. 70-77). Without repeating these in full, we desire to indicate that he was required to exercise supervision over transactions; to supervise the classification, storage and disposition of salvage; to maintain records and inspections; to deliver no property to a buyer until payment had been made, to prevent dishonest practices in weighing property and the like. The government also read excerpts from the procedure relating to competitive bidding and spot negotiated sales (R. 73-75). However, appellant's request that the government be required to designate specific portions of the manual was denied, the Trial Court suggesting that the jury consult the index (R. 331-332).

Obviously, if Apperson had the authority to make a spot sale of the government property involved, his delivery thereof to appellant without payment would have been a deviation from his duty which would bring the case within the scope of the statute. However, it appeared on direct examination that his only authority in this record was in the matter of scrap lumber. Thus he testified (R. 101-102):

> "Q. Did you have any authority at any time during the month of November, 1948, to accept money pay-

ments for any surplus scrap or salvage property of the United States Government that would be removed from the Air base or the control assumed by any purchaser or any other person? A. I did have authority to sell scrap lumber, but specifically scrap lumber and only scrap lumber.

"Q. Did you have any authority at any time during the month of November, 1948, to accept money in payment of any scrap or surplus property of the United States Government, the property consisting of overcoats, parkas, field jackets, blucher boots, or any clothing item? A. No.

"Q. To whom were all payments required to be made for any such items during that month? A. To the purchasing and contracting officer.

"Q. Who was then Lieutenant Greene? A. That is right, it was then Lieutenant Greene."

More specifically, on cross-examination Apperson testified that he could not have legally accommodated appellant so as to permit the removal of the merchandise that evening (R. 149), saying (R. 150):

> "It is exactly the same as taking anything that doesn't belong to me. * * * I couldn't have done it legally."

Moreover, Apperson's superior, Lt. Greene, had ruled that no government handling would be furnished for the removal of merchandise, and Apperson's act in furnishing the labor was simply an accommodation to appellant (R. 154).

It is important to point out furthermore that Apperson could not have lawfully delivered the property in question to appellant even though appellant had paid for it, as appears from the following in his testimony (R. 191-192):

"Q. Well, is there any manual which gives you the right to send the merchandise through to New York City as in this Case? A. No.

"Q. Without getting paid for it and without asking anybody's permission? A. No.

"Q. As a matter of fact there isn't any such, you couldn't find any such permission in there, could you?

A. No. I am guessing that. I have never done this before so I don't know.

"Q. In other words, you wouldn't last a minute if you ever took stuff right out of that warehouse? A. That is right.

"Q. Without the permission of somebody in authority? A. That is correct.

"Q. And put it on that car and send it off; even if you were paid for the merchandise, you couldn't do it? "A. I don't know. All I know is I am responsible for a certain amount of Government property.

"Q. As a matter of fact if you were able to get a million dollars for stuff worth ten thousand dollars, you couldn't get that stuff or send it off? A. That is correct.

"Q. It would have to go through a certain amount of red tape? A. In have in other cases.

* * * * * *

"Q. I will go further. Would you ship it to him even if you got paid one hundred thousand dollars? A. No, not if I were paid one hundred thousand dollars.

* * * * * *

"Q. Now if you received a hundred dollars as an individual from Mr. Schneider for stuff worth a maximum to the Government of $36,000, and you take that check and turned it into the Government, would you be permitted to accept it in that form? A. I understand what you are getting at. I can't make any spot negotiation sale for $100 or $10,000.

"Q. And this was not a spot negotiation sale? A. It was not."

The lack of Apperson's authority to permit the withdrawal of any merchandise under any circumstances is further established by the testimony of the government witness Aulgur (R. 230-231):

"Q. Well, what would you require of a purchaser to do before you would start loading the merchandise? A. Either he would have a slip from the contracting officer stating the fact that he had paid the balance or a call from the contracting officer stating that he had paid it.

"Q. In other words, the release of the merchandise would have to come from the contracting officer? A. Yes, sir.

"Q. Is he the only man who has the authority to release the merchandise after it has been paid? A. Yes, sir.

"Q. And the contracting officer wasn't Lieutenant Apperson, was it? A. No, sir.

"Q. Lieutenant Greene, is it? A. Yes, sir."

If the process of withdrawing additional merchandise were to be likened to a spot sale, on this particular subject Apperson pointed out to appellant that authorization therefor had to come from the Commanding General of the Air Material Command, and, to use the language of the witness (R. 87), he "very carefully explained it to him I had no such authority". Special Officer Matthews correctly viewed the transaction as tantamount to larceny, testifying (R. 284), "it was rather apparent to both of us what it would amount to in other circumstances the stealing of property would not be right".

The indictment describes Apperson as "Air Force and Base Salvage Officer" (R. 2-3). In attempting to prove his authority, the government introduced (R. 141, 340) Exhibit 7 a certain special order giving Lt. Apperson, among other things, "primary duty as salvage and property disposal officer". Evidently realizing that this was not in accordance with the indictment, the government sought over objection to introduce proof by Major Redding (R. 140-142) that this order made Apperson the Base Salvage Officer. The discrepancy, we submit, especially in the light of the other testimony indicating Apperson's extremely limited powers, was such a variance as to constitute a failure of proof.

In this same connection it becomes important to examine the contents of the indictment itself (R. 2-3), wherein it is charged that defendant promised and gave the bribe "with the intent to influence the decision and action of the said Harvey B. Apperson * * * in respect to the disposal of salvage property". The record can be searched in vain

for the slightest indication of any decision or action then required to be officially taken by Apperson. With regard to any salvage property whatsoever the instruction manual placed in evidence prescribed a detailed routine for its sale or disposition. Nothing contained in that work or in any of the evidence discloses that Apperson could have ordered the removal of merchandise from warehouse 1045 or for that matter from any other locality without complete conformity by the recipient with the entire routine of public sale and competitive bidding; in the case of spot sales it was clear that Apperson's authority was limited to the disposition of scrap lumber; and Apperson specifically testified that no proceeding looking towards the disposition of property could in any event be inaugurated without the prior approval and cooperation of Lt. Greene. Accordingly, the consummation of a scheme whereby appellant or any person might obtain salvage property without paying for it would have necessitated obtaining the sanction of the various higher officers, to say nothing of a complete revision of the manual, and the limitation of Apperson's own meager authority was such that he could not on any construction of the regulations or the evidence be viewed as an officer in a position to effect a delivery or transfer in violation of some supposed duty. We may go further and say that the concurrence of all persons in the hierarchy would not have sufficed to effect a removal of the merchandise in warehouse 1045 to appellant. That could be accomplished lawfully only in a certain way. There was actually nothing for Apperson to decide and no action to be taken by him. Therefore, a payment to him in some illusory connivance or permission did not constitute an influencing of decision or action (the language of the indictment) in respect to the disposal of salvage property so as to constitute appellant guilty of the crime charged in the indictment. No matter how appellant's acts are viewed and to what criticism they may be subject, this could not compensate for the failure to show the giving of a bribe not directly related to the performance of an official function.

The utter absence of this element requires the dismissal of the indictment as in *Blunden* v. *United States* (C. C. A. 6, 1948), 169 F. 2d 991—where there was no entrapment at all and defendant's acts were denounced by the Court.

In arguing the insufficiency of the indictment in the preceding point, we indicated its over-all vagueness and its omission to specify the matter supposedly pending before Apperson, the nature of the decision or action sought to be influenced and what unlawful act appellant attempted to induce. In short, the prejudice to appellant from these crucial omissions was such as to vitiate the indictment and render it insufficient as matter of law. One might suppose that the trial and the production of evidence would supply what the indictment lacked, but after a reading of the record one is confronted with the same questions. What matter was pending before Apperson for official action? What decision was he supposed to make? What action was he called upon to take? What unlawful act and what violation of duty did appellant induce? In other words, just as the indictment was fatally defective in its failure to charge these matters, so the proof was silent upon all of these cardinal and indispensable factors. Indeed, the evidence in a way supplies an answer to the natural query of why the government failed sufficiently to charge the supposed crimes, and that answer consists of the fact that the provable acts did not and could not supply the necessary subject-matter of the allegations. To sum up the situation, no violation of the statute could be charged for the simple reason that no such crime could be proved.

POINT 3

The prosecution made improper references to other offenses supposedly committed by appellant.

In his opening address to the jury the Assistant United States Attorney said (R. 51):

> "Lieutenant Apperson will testify that in the course of the afternoon and the various conversations that he

had with the defendant the defendant told him he operated on a very large scale in all the eastern depots; that in one particular place he had a man there who got the commodities as they came on to the depot and short-counted them and set aside materials for him so he was able to get it, and most of these commodities would never reach overseas destinations because they would go to other salvage operators who operated on that basis in the east. He said he made a practice of making bids on salvage property around at various places in the United States and after securing the bid he then put a claim into the United States Government that the commodities were not as represented to him and asking for damages, and that he had political influence in the east and that he obtained assistance in getting those claims of damages allowed. * * * "

Defendant's counsel immediately interrupted and charged that this narrative was prejudicial, whereupon the Court stated (R. 51-52):

"The Court: Well, his admissions are on other offenses he committed. The jury would be warned in the instructions as to that that they are not to consider and I doubt whether he could prove other offenses that might be admitted or testified to."

The prosecutor himself quite evidently realized that he had done something wrong, for he thereupon said (R. 52):

"Mr. Lamb: Well, if the court please, in the feeling that perhaps I may have overstepped the bounds of propriety I will apologize to court and counsel and to the jury and if any evidence of that sort is not admissible and is not admitted in evidence I, of course, will join with the court and other counsel in asking the jury to completely disregard anything I might say that is not borne out by the witness."

Defendant's counsel thereupon took exception to the very prejudicial remarks that had been made, and the objection was repeated when the opening was finished (R. 57).

When the witness Apperson was asked about discussions with appellant regarding further activities at other depots, an objection to such evidence was sustained (R. 99).

In the midst of the trial the witness Aulgur was asked regarding a further conversation with appellant. Objection was taken to this proposed line of testimony, it was overruled and exception duly taken, whereupon the witness testified as follows (R. 220-221):

> "Mr. Schneider referred to the property laying on the floor and asking if some kind of a deal couldn't be made. I informed him the property had been listed for sale and would be published in the very near future and if he cared to, he could look the property over and I would give him a form showing the property so he could submit a bid. And as I started to go after the form he made the remark that he thought I misunderstood him; he meant just a deal between the two of us."

The net result of the foregoing combination of improper opening and improper evidence was to depict appellant as one who made it a practice of conspiring to create fraudulent claims against the government and of furthering them by political influence; also that he had made illegal overtures to Aulgur. None of these matters were charged in the indictment, nor were they admissible on any theory of a requirement to show motive or intent in a situation otherwise ambiguous. Their sole effect, if not purpose, was to impute other crimes to appellant and to vilify him in the eyes of the jury and preclude a dispassionate consideration of the case on the merits.

We submit that the introduction of matter of this sort constituted a grave invasion of appellant's rights. He was entitled to a trial on the material issues, unaffected by the introduction of irrelevant and improper matter having no direct bearing on the question of guilt or innocence. Not taking the stand, he could not be confronted with evidence of other supposed derelictions. Nevertheless, by reason of the unfortunate occurrences referred to above, effective hints were brought home to the jury that appellant was a man of criminal and dishonest propensities. It is difficult to conceive of anything more truly calculated to insure a

conviction—especially in a case wherein there was considerable doubt of whether the acts charged were those denounced by the statute—than importing to the jury that appellant was an old hand at this sort of thing. There is no need at this late date to argue anew the proposition that the government may not as part of its affirmative case introduce evidence or intimations of the commission of other crimes by a defendant. Such matter was barred in the leading case of *Boyd* v. *United States,* 142 U. S. 450, 35 L. Ed. 1077. There, on a trial for felony, evidence of other crimes committed by the defendant, was held inadmissible for the identification of the defendant or for any other purpose whatever where those crimes were wholly apart from the inquiry as to the current crime and the defendant might have committed the others and yet have been innocent of this one. Moreover, the error of admitting such evidence was held not to be cured by the judge's charge that defendant was not to be convicted because of the commission of such other crimes.

As a general proposition, the Supreme Court of the United States further held that the prosecution could not, in a criminal case in any Federal court, resort to any kind of evidence of a defendant's evil character to establish a probability of guilt. *Greer* v. *United States,* 245 U. S. 559, 62 L. Ed. 469. The only point at which such proof is admissible is in connection with impeachment of a defendant or his witnesses— and not as part of the prosecution's case (barring, of course, the exceptional instances where it becomes necessary to prove motive, intent and the like). As Mr. Justice Jackson stated, in *Michelson* v. *United States,* 335 U. S. 469, 93 L. Ed. 168:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U. S. 559, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation

> on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The same Justice also recently remarked, in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. Ed. 790:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559, 92 L. Ed. 154, all practicing lawyers know to be unmitigated fiction."

The cases wherein the reception of evidence of this type has been condemned are so numerous, and the rule so firmly entrenched in our law, as to dispense with the need for extended citation. Several well-reasoned illustrative authorities are *Templeton* v. *United States,* (C. C. A. 6, 151 F. 2d 706; *Smith* v. *United States* (C. C. A. 9), 10 F. 2d 787; *United States* v. *Dressler,* (C. C. A. 7) 112 F. 2d 972; *Sang Soon Sur* v. *United States,* (C. C. A. 9) 167 F. 2d 431.

The utter impropriety of the references had the effect of depriving appellant of a fair trial, and are sufficient in and of themselves to call for a reversal of the judgment.

POINT 4

It was reversible error to receive in evidence the testimony of the witness Walker regarding three alleged telephone conversations with appellant in the absence of any proper foundation or identification of the person with whom those conversations were had.

The government called as a witness one LaVaughan Walker, who was an Air Force private assigned as typist and clerk in the salvage office at the time of the alleged offense (R. 207-208). He testified that in October, 1948, he received several telephone calls from an individual who identified himself as Meyer Schneider, of New York City. Appellant promptly objected to this testimony (R. 208) on the ground that no proper foundation was laid through recognition of the voice of the other party or otherwise (R. 208-209). The omission was not supplied throughout his testimony, and repeated exceptions were taken (R. 209, 210, 217).

The conversations thereby imputed to appellant were to the effect that appellant wanted to know what sort of goods were included in the merchandise as to which his bid had been accepted (R. 210-211), whether there was an overage in the materials, whether any socks were included and whether they could be separated from the other materials (R. 210-212). The witness also testified that the individual at the other end of the phone said (R. 213), "I am just an everyday guy; can you help me out?" The Court declared that this testimony was "certainly relevant" (R. 212-213), and it is clear that the purpose of introducing it was to show that appellant was laying the ground work for some ulterior approach. Of course, this was flatly at variance with the theory of defense attempted to be developed on cross-examination of Apperson that appellant came to Montana at the instance and solicitation of Apperson. Accordingly, if the evidence was not competent, it was clearly prejudicial.

The incompetency of the evidence appears from a line of authority applicable both to criminal and civil cases, the essence of which is concisely stated in *Bonner Mfg. Co.* v. *Tannenbaum*, 169 N. Y. S. 43, where Guy, J., wrote:

> "'One who has held a conversation by telephone with another person, stated to have been the defendant, cannot testify as to what that person said, unless he recognized his voice, or his identity has been established with reasonable certainty by other evidence. And this is so, although he testifies that the person answering him said he was the defendant, if the witness cannot state that he recognized the defendant's voice.' Mankes v. Fishman, 163 App. Div. 789, 149 N. Y. Supp. 228."

The mere fact that the witness said that the person speaking to him purported to be the appellant is not a sufficient identification to render the evidence of the conversation competent. *Robilio* v. *United States* (C. C. A. 6, 1923), 291 F. 975, cert. den. 263 U. S. 716, 68 L. Ed. 522; *Wallace* v. *United States* (C. C. A. 6), 291 F. 972. It is the general rule that the witness must recognize the declarant's voice. *United States* v. *Frankel* (C. C. A. 2 1933), 65 F. 2d 285, cert. den. 290 U. S. 682, 78 L. Ed. 588.

Under the foregoing circumstances it is obvious that the reception of this evidence was in violation of well-established rules and was clearly injurious to appellant.

Before concluding our discussion of this point, we desire to urge, in accordance with the argument and authorities set forth in the preceding point, supra, that even if this particular evidence were adjudged competent and the obstacle of failure to identify appellant's voice were overcome, the evidence of alleged telephone conversations occurring prior to November 22nd and November 23rd, the dates specified in the indictment, was irrelevant and immaterial to the issues being tried. Objection and exception were seasonably taken (R. 220-221) on the ground that these matters had nothing to do with the indictment, and they were nevertheless received. They had a tendency to be-

cloud the issue and introduce collateral matters with the evident purpose of depicting appellant in a dishonest light and thereby precluding a fair determination on the matters that actually were pertinent. The testimony of the witness Aulgur (R. 220-221), more fully discussed under Point 3, is subject to the same criticism. The case could properly turn only on the conversations and transactions had between appellant and Apperson, as charged in the indictment. Supposed conversations with others were strictly *res inter alios acta,* and should not have been permitted, especially in view of the patent prejudice to appellant's cause. The procedure of the prosecution whereby these extraneous matters were brought to the attention of the jury was plainly violative of defendant's rights, and must be so regarded irrespective of whether a proper foundation for the proof was laid.

POINT 5

The refusal of the Trial Court to permit appellant's counsel to inspect memoranda used by the witness Matthews to refresh his recollection was reversible error.

Special Agent Matthews testified at considerable length regarding his alleged conversations with appellant (R. 270-274) after the arrest, and the evident purpose of this proof was to corroborate Apperson's testimony concerning his dealings with appellant. In the course of this testimony of Matthews the witness, at the suggestion of the Court and the Assistant United States Attorney, referred to the notes made by him at the time (R. 272-273) and refreshed his recollection thereby. Soon thereafter (R. 280-281) appellant's counsel requested permission to examine the notes, this permission was refused and exception duly taken.

This ruling was contrary to the established law, which is concisely stated in Underhill on Criminal Evidence, 4th Edition, Sec. 395, as follows:

> "Memoranda used by a witness to refresh his memory must be made available for inspection and use of the adverse party."

Federal courts have uniformly held to the same effect, as appears from the decisions in *Brownlaw* v. *United States* ( ) 8 F. 2d 711; *Taylor* v. *United States* ( ) 19 F. 2d 813; *Lennon* v. *United States* ( ) 20 F. 2d 490; and *Luse* v. *United States* ( ) 49 F. 2d 241.

The denial of this important right to appellant foreclosed a significant avenue of potential cross-examination, and the very unwillingness of the government to make the data available is indicative of an intent to withhold information of a probable value to the defense.

POINT 6

The Court erroneously charged the jury that the crime charged could be committed by negligence, and thereby in effect negatived the requirement of criminal intent.

In charging a jury in a bribery prosecution, "the court must instruct the jury as to the necessity of the existence of a criminal intent" (11 C. J. S. 875). On this phase of the case the Court below began by saying (R. 364):

> "Now, of course, intent, the intent is always an element, necessary ingredient to be established in a case of this kind."

So far the charge is correct, but then the Court proceeded to instruct:

> "This is a felony case and the jury before they can convict the defendant must find here in this case be-

> yond a reasonable doubt a joint operation of act and intent, or what we call in law criminal negligence. Now criminal negligence in that connection means the doing of an act with a reckless disregard of the consequences, not caring particularly what happened."

Due exception was taken to this portion of the charge (R. 375-376).

There is no reason whatsoever for the introduction of this confusing and altogether inapplicable element into the case. We are aware of no reported decision where the crime of bribery was held to have been committed, or capable of commission, by negligence however aggravated. As was declared in *Harris* v. *United States* (C. C. A.), 8 F. 2d 841, it is essential to the offense that the offer, promise or gift be made with a corrupt and dishonest intent to influence the officer in the discharge of his official duties (see also 11 C. J. S. 844), and no degree of carelessness can operate as a substitute for the requisite intent. The charge given permitted the jury to speculate that appellant may have recklessly given Apperson a gratuity —without the specific criminal intent called for by the law —and they may have adjudged him guilty in consequence. The charge as given was manifestly prejudicial and contrary to law.

POINT 7

The undisputed evidence discloses the existence of an elaborate plan to entice appellant to offer a bribe, so as (a) affirmatively to sustain the defense of entrapment and necessitate a judgment of acquittal; or (b) in any event to require the submission of that issue to the jury.

When a defendant has been officially enticed to commit a crime, he has a valid defense of entrapment. Specifically in the case of the offense of bribery, where the idea therefor emanates from the offeree or is so furthered and en-

couraged as to induce or effectively stimulate its perpetration, the defendant may not be adjudged guilty.

Cases have frequently arisen under 18 U. S. Code Sec. 91, the predecessor of the statute involved herein, wherein the defense of entrapment has been held tenable—either from the standpoint of calling for an acquittal or from that of requiring appropriate instructions to the jury. So, in *United States ex rel. Hassel* v. *Mathues* (D. C. Pa. 1927), 22 F. 2d 979, where the relator's brother had approached prohibition agents with the offer of a bribe and those agents demanded the presence of the relator, the subsequent charge of bribery brought against the relator was held to be the result of illegal entrapment. And in *Gargano* v. *United States* (C. C. A. 5, 1928), 24 F. 2d 625, it was held that if the idea of bribery originated in the mind of the government officer rather than in defendant's, the defense of entrapment was complete and the establishment of such a defense entitled the accused to an acquittal. Even an intermediary transmitting bribe money from one desiring protection to a government agent may not be guilty if his act was induced by entrapment, according to *Ybor* v. *United States* (C. C. A. 5, 1929), 31 F. 2d 42. Likewise, in *United States* v. *Lynch* (D. C. N. Y. 1918), 256 F. 983, entrapment was held a defense to an indictment for offering to bribe a government official to influence favorable action by the official upon awarding a contract to the accused. That the question may properly be one for the jury appears from *Capuano* v. *United States* (C. C. A. 1, 1925), 9 F. 2d 41, where in a trial for the bribery of federal prohibition agents the refusal of requested instructions on the subject of entrapment was held error.

As will be presently shown, much of the evidence on this trial, both by direct testimony and what was elicited on cross-examination, was strongly indicative, if not conclutive, that appellant was entrapped. A motion for judgment of acquittal on this ground (R. 339) was made and denied (R. 348), with due exception taken. An instruction

on the subject of entrapment was expressly refused (R. 351), and excepted to (R. 352), and the jury was told (R. 360-361):

> "* * * The court feels that it is its duty at this time to advise you that there is no defense of entrapment in this case, so that you will forget what was said by counsel in his examination of you on your voir dire examination, anything in respect to the question of entrapment as a defense here."

Further exceptions on the point were also taken (R. 374, 376). It is therefore abundantly clear that all aspects of the question were adequately raised, presented and reserved.

We now come to an examination of the record with a view towards determining what it contains to substantiate the defense of entrapment. Of course, this is a matter not to be weighed by the inspection of mere excerpts, but is peculiarly one which calls for a study of all the proof; naturally our stress of certain elements is not to be regarded as suggesting the exclusion of everything else. The prosecution was concerned about the question, for in the very opening it was said that after Apperson procured authority from the army to cooperate with the Federal Bureau of Investigation and the United States Attorney's office (R. 46):

> "* * * Lieutenant Apperson was very carefully cautioned that in no particular should he encourage the defendant, Meyer Schneider, but to let him take the reins, as the saying might be, and to be the driving force and merely accede to any wish of the defendant's he might express and just let him go and see how far he would go. Lieutenant Apperson expressed a willingness to cooperate. * * *"

Apperson testified that on the occasion of his first meeting with appellant, the latter examined certain shirts, trousers and other items in the warehouse and inquired how he might obtain them (R. 86-87). Apperson said that this

would mean a spot sale, as to which he "very carefully explained to him I had no such authority"—something most significant on another phase of our argument (Point 2). Since appellant had already made a legitimate purchase of other property, "he wanted to know if maybe we could swap or get together" (R. 87). This in itself is certainly ambiguous language. The witness evidently did not understand the remark *in mitiori sensu,* for his response was (R. 87), "I then didn't commit myself much one way or the other." However, the witness thereupon offered to show appellant the merchandise he had purchased and drove him from the office to the salvage yard (R. 87). When appellant supposedly stated that he was prepared to pay "to substitute some of the useful items for this scrap" (R. 88), the witness "indicated then I didn't want to have any part of it" (R. 89). Then they went to a coffee shop together, where, the witness said (R. 89-90), "I told him, well, I was very non-committal, I didn't say one way or another." When appellant had left, Apperson reported to the Officer of Special Investigation that an attempt had been made to bribe him, whereupon the Federal Bureau of Investigation, the Base Commander and the United States Attorney swung into action with the very evident purpose of contriving that this matter should not end then and there (R. 90-94). As Apperson stated to Mr. Matthews, the Federal Bureau of Investigation agent (R. 92), "I indicated my willingness to cooperate in any way I could." If appellant had any original evil intent and Apperson showed himself to be non-committal, there surely was a *locus poenitentiae,* but the law enforcement officials and the higher army officers—including Colonel Chennault, who was Base Commander, and Colonel Abdalah, Staff Judge Advocate (R. 92)—acting in conjunction with Apperson, were manifestly determined that this was a fish to be hooked.

So, on the following afternoon Apperson met appellant in the little Base Salvage office, where, as he described it (R. 94),

> "I pitched a jacket file in front of Schneider; that jacket file contained a complete list of the useful items, useful salvage items that we have in storage as salvage at that time * * *. He opened it. I did indicate to him or point to the total value, that is the original purchase price to the Government. I pointed to that. Schneider shook his head and then shook his head and indicated that was accepted."

Here we have a vivid picture of Apperson actually submitting to appellant a list of items of merchandise and the appellant shaking his head to indicate acceptance. It must be remembered that Apperson was supposedly acting on the instructions of his superiors and Special Agent Matthews, who was himself an attorney (R. 275), and was presumably attempting to avoid any semblance of entrapment. Nevertheless, the foregoing excerpt, even after we make due allowance for the intent of the witness not to disclose himself as the initiating force, affords a striking analogy to the legal concept of the making of a contract with Apperson in the role of the offeror while appellant "shook his head and indicated that was *accepted*." The jacket file will be discussed again below.

After this "acceptance," according to the witness, appellant said nothing, and the very next thing we find happening is that Apperson explains to appellant as follows (R. 95):

> "I explained to Schneider then that he would have to pay my boys or my enlisted men for loading the stuff and it would have to be loaded after hours * * *."

So, in addition to furnishing a list of suitable items to appellant, the witness went ahead to explain the procedure whereby the goods were to be taken away. After he "advised him of that situation" (R. 96), appellant agreed to the arrangements and then (R. 97), "We went to the freight car and started loading the clothing which was put up in cartons into this truck to haul to the freight car." Sergeant Aulgur testified that it was Apperson who gave instructions

as to the manner of loading (R. 223-224). After the truck was loaded (R. 98), "We followed the truck down to the freight car and watched the men unload it into the freight car." This activity took from 4:30 until about 6 P. M. (R. 99-100).

The witness and the appellant then went to Murrill's Bar, where they had a few drinks (R. 107). Apperson left appellant and went into the men's room, where Special Agent Matthews searched him as part of the plan (R. 107). Apperson and appellant left the bar and walked down Central Avenue to the Park Hotel, where they went up to appellant's room (R. 108) under these circumstances, according to the witness, "I expressed the desire for another drink and he said he had some good Scotch so we went to his room." There the parties had a conversation with regard to a certain claim of appellant's with War Assets (R. 108-109). After they had a drink, appellant tendered $1400 to the witness. He then testified (R. 110):

> "Q. And what did you do or say? A. Well I was dissatisfied."

Thereupon appellant gave him another $100, or $1500 in all. The significance of this element of the transaction cannot be over-emphasized. Here from Apperson's own lips, despite his supposed mighty striving to occupy a passive, non-entrapment position in the deal, we see him actively protesting the amount tendered and by his conduct insisting upon extracting from appellant a greater sum. Since 18 United States Code Section 201 permits the imposition of a fine three times the amount of the bribe—and such triple fine was actually imposed in this case—we find a situation wherein at the very least a portion of the bribe was affirmatively and exclusively evoked by the witness (and not originally offered by appellant) and wherein such increased bribe could and did have the effect of augmenting the punishment to which appellant has been subjected. Thus *pro tanto* there was an undeniable case of entrapment. If this does not taint the entire scheme to involve

appellant in the commission of bribery, the minimum effect ascribable to it is that it gives considerable color to the contention of entrapment and requires that the entire issue should have been submitted to the jury.

Cross-examination of Apperson accentuated his affirmative actions in causing the removal of the merchandise (R. 159):

> "Q. But notwithstanding the fact that he didn't pay for it you removed it from the warehouse, loaded the truck and put it right on the car, didn't you? That is a fact? A. I removed it from the warehouse and put it on the railroad car?
>
> "Q. Without having Mr. Schneider pay for it? A. That is right."

So it is plain that Apperson's part in the loading and removal of the goods was not that of a passive observer. Moreover, he made it clear that he accommodated appellant and furnished the labor (R. 154), and that Colonel Chennault had given him a letter permitting him to go ahead and cooperate (R. 164).

When it came to suggesting payment of the alleged bribe, one would expect that in this prosecution the prime mover would be appellant, but Apperson's testimony establishes that he himself took the initiative at a crucial moment (R. 170):

> "Q. Well, did you request Mr. Schneider to pay you right at the bar? A. I suggested that we settle up.
>
> "Q. Right at the bar? A. Yes, I think I did there at the bar."

So Apperson was not only quite anxious to get the money from appellant, but also would have preferred that the payment be in the presence of witnesses, saying (R. 199):

> "At the time in Murrill's I more or less, well, I delayed, I stayed at Murrill's as long as we could hoping he would pay off in front of any witnesses that might be there. And we also had a pre-arranged signal that I should drop a handkerchief or napkin when he had

> paid off * * * after we left Murrill's Bar and went to the Park Hotel I suggested we have another drink and hoping he would go into the bar and pay me and thereby still having witnesses * * *."

Apperson was therefore concerned not only that the amount of the bribe should be as large as possible, but also that it be handed over quickly and in such a locality as to make the transfer visible to the several prepared witnesses in the establishment.

The cross-examination of Apperson also threw important light upon the inception of the plan—one of the crucial factors in any determination of whether there was an entrapment. Apperson was asked what he did at the beginning of the interview, and he said (R. 204).

> "I placed the file with those turn-in slips in front of him."

Appellant's counsel asked whether the witness intended to catch appellant. After some objection, the Court paraphrased the question and obtained an answer thus (R. 204-205):

> "The Court: Was this the beginning of the plan or whatever it was? A. Yes, sir. I just put this thing in front of him to see what he would do.
>
> "Q. Well, what was it you put in front of him? A. The file with the turn-in slips in it.
> "Q. With what slips? A. These turn-in slips. These 447s we call it.
> "Q. What did you do that for? Was it pursuant to a conversation you had with him? A. No, sir, I just told him what I had.
> "Q. That is, you mean what salvage or property you had? A. Yes.
> "Q. Salvage property? A. Yes.
> "Q. Did he say anything about a list or wanting to see a listing or anything of that sort? A. No.
> "Q. How did you happen to do it. What suggestion did you surmise? A. I guess just to show him what I had, that is all.

"Q. And in pursuance to some conversations you had had theretofore in regards other purchased property was that in answer to something he talked to you about? A. No, sir, he hadn't mentioned it at all.

"Q. Well, was it pursuant to his visit? I am trying to get at how it happened, what preceded it? A. Nothing. He was just in my office and I just threw this file in front of him to see what he would do to see if he was interested in that stuff.

"Q. Was that the first interview you had with him? A. No, this was the second day.

"Q. This was the second day. Oh, after he made the offer to you? A. Yes."

At this point appellant's counsel resumed cross-examination and elicited the following (R. 206):

"Q. Lieutenant Apperson, that was after the arrangement was made with Mr. Matthews? A. That is right.

"Q. And that was pursuant to a plan that was the way you would start the thing off? A. It wasn't any plan exactly. It was just an idea I had.

"Q. That was the idea you had? A. Yes.

"Q. Now, that list that you showed him that contained all these goods that really weren't for sale, were they? A. They would have been available.

"Q. But they weren't for sale then? A. No, not that minute.

"Q. You couldn't have sold them to him if you wanted to? A. I explained that to him that I could not.

"Q. But nevertheless you threw the thing at him? A. Yes.

"Q. And the purpose was obviously to follow the plan you pre-conceived in arrangements with Mr. Matthews? A. I would say so, yes."

With due allowance for the abortive discussion of the day before, we submit that the two passages last quoted tend strongly to support the defense of entrapment. The whole theory of entrapment turns upon intention and the state of mind of each respective party, and Apperson, notwith-

standing his being a government witness and the admittedly explicit instructions he had received, could not help but disclose *se invito* an attitude of affirmative instigation and shrewd enticement.

Accordingly, if the plan to give and accept a gratuity is scanned from its genesis to its consummation, we find that Apperson, guided by his mentors, was far from passive; that he was not merely receptive; but that he was actually the driving force in virtually every phase. An impartial view of the evidence cogently suggests that the undisputed proof showed entrapment as matter of law, and, without prejudice to that contention, the least to which appellant was entitled was to have the jury pass on the question under appropriate instructions.

The whole subject of entrapment is thoroughly discussed in *Sorrells* v. *United States,* 287 U. S. 435, 77 L. Ed. 413, where Mr. Chief Justice Hughes wrote:

> "The Federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of Butts v. United States (C. C. A. 8th) 18 A. L. R. 143, 273 Fed. 38, supra, as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.' The judgment in that case was reversed because of the 'fatal error' of the trial court in refusing to instruct the jury to that effect."

The Court also quoted with approval the opinion of Woods, Circ. J., in *Newman* v. *United States* (C. C. A. 4, 1924), 299 F. 131:

> "'It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.'"

The Supreme Court concluded:

> "The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct."

In the same case Mr. Justice Roberts wrote a separate concurring opinion, in which Mr. Justice Brandeis and Mr. Justice Stone agree, saying:

> "There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require."

We anticipate that in answer to our contention the government will urge that the idea originated with appellant, but we submit that even on the present record the proof

indicates in the first place that the conversation of the preceding day had concluded that particular matter and that the events of November 23rd were wholly the product of Apperson's plan with the government's agents. In either case the issue was surely one for jury consideration if not determination by the Court.

That a defendant at some prior stage made overtures towards a government official looking towards the possible commission of a crime does not necessarily eliminate the defense of entrapment. In *Sam Yick* v. *United States* (C. C. A. 9, 1917), 240 F. 60, the inspector testified:

> "On the way out he asked me what salary I was getting and whether I had a family to support, and if I could save money off the salary I was getting, and if I had any opportunity to make money on the side, and how much money I made on the side; but I answered, rather shortly, I didn't consider it any of his business, and for the time being the subject was dropped. Then I went out there and examined this man, and on the way back he brought up the matter again, and he asked me if I didn't want to make more money than I was making, and I asked him how he meant."

The officer reported this conversation to the Assistant United States Attorney, who instructed him "to go ahead and try to apprehend him by going in with him." In reversing the conviction, this Court cited its own previous holding, saying (by Ross, Circ., J.):

> "In the recent case of Woo Wai v. U. S. (C. C. A. 9, 1915) 223 F. 412, we distinctly adjudged that it is against public policy to sustain a conviction for crime where the party or parties are induced to commit by officers of the government who thereafter ensnare and apprehend them in such commission."

A helpful compilation of related cases is contained in the note to *O'Brien* v. *United States* (C. C. A. 7, 1931), 51 F. 2d 674.

A holding which closely resembles the instant case on the facts is one cited with approval in *Sorrells* v. *United States,* 287 U. S. 435, 77 L. Ed. 413, namely, *United States v. Lynch* (D. C. N. Y. 1918), 256 F. 983, the opinion in which consists of the charge of the Court. Hough, D. J., wrote:

> "A man who expected to be an officer in the United States Army, and had a very good reason to believe that he would soon be commissioned, was asked what he would want out of a government contract over which he seemed—only seemed—to have some control. He replied most properly, most honorably, 'nothing,' because he was about to become an officer; and there the matter dropped on that occasion."

Later, at the instigation or by the order—and the Court said it made no difference which—of government officers comprising the Department of Military Intelligence, the officeree told defendant that he had reconsidered the question and in effect asked for the money. The Court held that this constituted "provoking and creating a crime", saying further:

> "Border line cases are difficult, and doubtless it is usually best to leave the matter to the jury when and if, in view of the evidence, a reasonable man would be justified in holding that the accused had the intent or desire to do that for which he was indicted, and seized and swallowed the bait that was laid for him."

On the foregoing facts the Court held that the prosecution was "an endeavor to punish a crime which would never have been committed if it had not been for the request of the government officer", and thereupon peremptorily advised the jury to acquit the defendant.

CONCLUSION

For all of the foregoing reasons the judgment of conviction appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Appellant.

LOUIS M. LEIBOWITZ,
of Counsel.

APPENDIX

IN THE

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MEYER SCHNEIDER, Defendant.	No. 8088

Defendant's Request for Instructions

COMES NOW MEYER SCHNEIDER, the defendant above named, and respectfully requests this honorable Court to give to the Jury Instructions numbered 1 to 5, inclusive, submitted herewith.

H. R. EICKEMEYER,
LOUIS M. LEIBOWITZ,
J. F. ENRIGHT,
Attorneys for Defendant.

Instruction No. 1

You are instructed that a presumption is a deduction which the law expressly directs to be made from particular facts, such is the presumption of innocence in this case which arises from the facts that the Government has charged the defendant with the commission of the offenses alleged in the Indictment; and the defendant has pleaded not guilty thereto. Such a presumption may be controverted or overcome by other evidence, but unless so controverted or overcome, the jury are bound to find in accordance with the presumption.

Founded on Section 10602-10604 RCM 1935.

Instruction No. 2

Presumption of Innocence

You are instructed that in every prosecution for a crime or public offense, the defendant is presumed to be innocent.

You are further instructed that such presumption is not an idle presumption but has the force and effect of evidence and abides with the defendant throughout the trial of the case and during your deliberation and entitles the defendant to an acquittal unless and until, after due deliberation, you find unanimously that such presumption has been overcome by the Government's evidence and that the Government has established the guilt of the defendant beyond a reasonable doubt.

Instruction No. 3

Entrapment

If you are satisfied that prior to the commission of the acts alleged to constitute the crime, the crimes charged, or either thereof, if you find such acts were committed, that the defendant never conceived any intention of com-

nitting these offenses or similar offenses, but that the officers of the Government incited and by suasion and representations lured him to commit one or more of the offenses alleged in order to entrap, arrest and prosecute him therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of not guilty.

Capuano v. *U. S.*, 9 F. 2nd 41.

INSTRUCTION No. 4

BIAS OR PREJUDICE OF WITNESS

I charge you, Ladies and Gentlemen of the Jury, that if any witness for the Government in this case, has shown bias or prejudice against this defendant, and satisfies you that he has not testified truthfully in this case, you may disregard his testimony altogether, and if the guilt of this defendant depends upon such testimony, then find the defendant, not guilty.

Pinkerton v. *U. S.*, 145 F. 2d 252.

INSTRUCTION No. 5

FAILURE OF DEFENDANT TO TESTIFY

The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the Jury is charged that it must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into the discussion or deliberation of the Jury in any manner.

Bruno v. *U. S.*, 308 U. S. 287, 84 L. Ed. 257.